No. 12751

United States Court of Appeals

For the Ninth Circuit

MAKAH INDIAN TRIBE, a Corporation, CHARLES E. PETERSON, DAVID C. PARKER, KENNETH WARD, JOHN H. IDES *and* CLIFFORD JOHNSON, Individually and as Members of the COUNCIL OF THE MAKAH INDIAN TRIBE, *Appellants,*

— VS. —

MILO MOORE, Director of the Department of Fisheries, State of Washington, *Respondent.*

APPEAL FROM THE UNITED STATES DISTRICT COURT, WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

APPELLANTS' OPENING BRIEF

J. DUANE VANCE,
BASSETT & GEISNESS,
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APPELLANTS' OPENING BRIEF

STATEMENT OF JURISDICTION

This action by the Makah Indian Tribe, a federal corporation chartered under the laws of the United States as the governing body of the Makah Tribe of Indians, and five individuals, the members of the Council of said Tribe, against the defendant, the Director of the Department of Fisheries of the State of Washington, was brought to obtain an injunction enjoining the defendant or his representatives, agents and employees from enforcing against the Makah Indians certain rules and regulations promulgated by the defendant concerning fishing in a certain stream

known as the Hoko River, on the ground that the application of said rules and regulations to the members of the Makah Tribe fishing in the Hoko River was violative of the treaty entered into in 1855 between the Makah Tribe of Indians and the United States of America. The complaint is at pages 3 to 13 of the transcript. The answer admits the organization and status of the plaintiffs and defendant and denies that the enforcement of said regulations is violative of the treaty (R. 14-17).

The treaty concerned which is set out in full in Appendix B hereto, was entered into between the Makah Tribe of Indians and the United States of America on January 31, 1855, and may be found at 12 Stat. at L. 939. By the terms of said treaty the Makah Indians ceded to the United States of America their claim to the lands they then occupied excepting a small portion thereof which was set aside as a reservation. The portion of said treaty around which this claim arises is contained in Article IV and particularly in the following words thereof:

> "The right of taking fish and of whaling or sealing at usual and accustomed grounds and stations is further secured to said Indians in common with all persons of the United States."

The jurisdiction of the district court is contained in Section 1331 of Title 28 U.S.C.A., which provides as follows:

> "The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $3000.00 exclusive of interest and costs *and arises under*

the constitution, laws or treaties of the United States." (Emphasis supplied)

After trial on the merits the trial court made and entered its order dismissing the plaintiffs' complaint (R. 42, 43). The appellants gave due notice of appeal and filed their cost bond (R. 43, 44, 45). The jurisdiction of this court exists by virtue of Section 1291 of Title 28 U.S.C.A., which provides in part:

> "The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States. * * *."

STATEMENT OF THE CASE

The following facts were admitted by the pleadings: The Makah Indian Tribe is a federal corporation with its headquarters at Neah Bay, Washington, and is a recognized and existing Indian organization of which the governing body is a Tribal Council consisting of five members who were the individual plaintiffs in this case. This action was brought by the Tribe and by the individual plaintiffs as a class action for and on behalf of all the members of the Makah Tribe of Indians. The Makah Indians and the United States of America entered into a treaty on or about the 31st day of January, 1855, by the terms of which the right of taking fish and of whaling or sealing at usual and accustomed grounds and stations was further secured to the Makah Indians in common with all persons of the United States. The defendant did and would, unless enjoined by the court, apply to the members of the Makah Tribe the laws of the State of Washington pertaining to fishing, the same being

the laws of Washington 1943, chapter 181, section 1, page 571 (Rem. Rev. Stat. 1943 Supp., Section 5717 -1) and the regulations of the defendant issued pursuant thereto, the same being General Orders Nos. 189 and 190 (Pls.' Ex. 7). It was denied that the application of said laws and regulations impinged upon the treaty rights of the Makah Indians.

The Makah Indians were and are so-called "fish Indians." At the time of the treaty they lived in houses made of big split cedars (R. 113, 114). Several families would live in each of these houses. They had regular benches above the sleeping places all the width and length of the house. Upon these benches they kept baskets where they stored cured fish for use during the winter months. Each family had its own place and each basket was marked for the winter month in which it was to be used. Each family would use two or three baskets a month (R. 114).

The Hoko River was a fall fishing river where the Makahs went in August or September (R. 112, 113) and would fill those baskets which were still empty. These salmon, which are also known as silvers, were largely called "fall salmon" (R. 112). In the other streams they caught what was called spring or Chinook salmon earlier in the year.

Such was the situation when the treaty party came to Neah Bay to negotiate with the Makahs. Article I of the Treaty provides that the Makah Indians cede all rights to the lands in country occupied by that Tribe bounded by the Oke-Ho River on the Straits of Fuca and the Pacific Ocean. The so-called

Oke-Ho River also then called the Hoke-ho is now called the Hoko River.

When Governor Stevens called the conference aboard his schooner and explained to the Indians the purport of the proposed treaty, Kal-Chote of Neah Bay spoke as follows:

> "He thought he ought to have the right to fish and take whales and get food where he liked. He was afraid if he could not take halibut where he wanted he would become poor." (Pls.' Ex. 8, p. 19)

Keh-Chook of the stone house (Tatoosh Island) followed and said:

> "What Kal-Chote had said was his wish. His country extended up to Hoke-Ho. He did not want to leave the salt water."

The Governor's reply:

> "Governor Stevens informed them that so far from wishing to stop their fisheries he intended to send them oil, kettles and fishing apparatus." (Pls.' Ex. 8, p. 19)

It is significant that these minutes (Pls.' Ex. 8) were prepared by the white men themselves. [That part of Ex. 8 specifically pertaining to the Makah Treaty is set out in the appendix.]

Klah-Pe-At-Hoo of Neah Bay said:

> "* * * He was willing to sell his land; all he wanted was the right of fishing." (Pls.' Ex. 8, p. 20)

It-An-Daha said, in part:

> "I shall submit all my difficulties to him (meaning the Great White Father); my wish is like

> the rest; I do not wish to leave the salt water. I want to fish in common with the whites." (Pls.' Ex. 8, p. 20)

There was some objection to giving up their homes to move on the proposed reservation and Governor Stevens asked—

> "Whether if the right of drying fish wherever they pleased was left them, they could not agree to living at one place for a winter residence, * * *." (Pls.' Ex. 8, p. 20)

The following day, upon the group being reassembled, Governor Stevens spoke to the assembly chiefs again and said, in part, as follows:

> "He (meaning the Great White Father) will send you barrels in which to put your oil, kettles to fry it out, *lines and implements to fish with.*" (Emphasis supplied)

The Indians were then generally agreed and, as per the words of Kal Chote:

> "What you have said was good and what you have written is good." (Pls.' Ex. 8, p. 21)

The treaty was then executed (Pls.' Ex. 8, p. 21).

The minutes reflect what was told to other tribes at or about the same time and, inasmuch as it is apparent that not all of the words used were recorded in these minutes, it is only logical to assume that the words, phrases and promises used to one tribe were equally used to another. In such a setting we quote from certain portions of the minutes of the negotiations with other tribes at or about the same time. In dealing with the Skokomish Indians there was considerable difficulty because the Indians desired to re-

tain half of their lands. In reply to this position the minutes show this:

> "Mr. Simmons, the agent, explained that if they kept half their country they would have to live on it and would not be allowed to go anywhere else they pleased. That when a small tract alone was left the privilege was given of going wherever else they pleased to fish and work for the whites." (Pls.' Ex. 8, p. 16)

One of the other chiefs sided with Governor Stevens and said:

> "My heart is good (I am happy) since I have heard of the paper read, and since I have understood Governor Stevens, particularly, since I have been told that I could look for food where I pleased and not in one place only. * * *. We are willing to go up the Canal since we know we can fish elsewhere. We shall only leave there to get salmon, and when done fishing will return to our houses. I am glad to acknowledge you and the Great Father as our Father." (Pls.' Ex. 8, p. 16)

Governor Stevens replied:

> "This paper secures your fish. Does not a father give food to his children? Besides fish you can hunt, gather roots and berries." (Pls.' Ex. 8, p. 17)

As explained by the witness, Perry Ides, at the time of the treaty there was no written language of the Makahs and everything has been passed down verbally. All knowledge and learning has been transmitted that way (R. 126). At the time of the treaty the Makahs did not have anyone who was educated enough to interpret to them the wording of the treaty.

That was the reason it was necessary to explain it to them in terms of something they could "see" so they could retain it in their minds (R. 128). Mr. Ides says that is the explanation for the words of the witness Claplanhoo who said (speaking to the assemblage in the court room in his native tongue):

> "* * *. It was my grandfather that received the treaty rights in 1863. They gave them in that treaty the right that we have, the right to fish in the Hoko River, and it was worded that they could fish there *as long as the tide came in and out again.* That meant that it was continuous. He was told our white friends would help us to continue the good will that the one who made the treaty had at that time for the Makah Tribe * * *." (R. 118, Emphasis supplied)

The Hoko River is about ten miles from the present boundary of the Makah reservation (R. 53). It is a small stream anywhere from twenty to fifty feet wide (R. 285).

Several of the older members of the Tribe testified as to their experience at the Hoko as children and the facts that had been related to them by their fathers and grandfathers concerning fishing there.

In ancient times the Makahs took fish from the Hoko by several means. They used spears and traps (R. 112, 122, 132, 149, 151, 152, 161). They made rope from whale sinew (R. 122, 132), and also from spruce roots and thistle bark (R. 151, 152). With this rope and with sticks they made mats and from them constructed traps on the same principle as modern fish traps (R. 112, 149, 161). Another form of

trap was to put a large log across the stream so the fish would have to jump over it and then put brush in the up-river side and the fish would get caught in the brush (R. 161). When they had caught all the fish they wanted they took the brush out and let the rest of the fish go on upstream. With rope, made from whale sinew, spruce roots or thistle bark, they made dip nets as much as eight feet wide, which they carried between two canoes (R. 122, 152). They also made gill nets just like gill nets that are used today from this whale sinew (R. 132). Plaintiff's Exhibit 9 is a large harpoon rope made from this whale sinew and demonstrates the Makah's ability to make rope from this material. As early as 1893 at least the Indians were using seines and drift nets which they obtained from the white men (R. 155). At least as early as 1900 the Indians were using gill nets in the Hoko and were selling the fish so caught to a cannery tender (R. 156). They were using drag seines at least by 1907 at the Hoko (R. 132).

Since about 1933 (R. 70) the defendant and his predecessors have, by arresting or threatening to arrest (Pls.' Ex. 6) and by confiscating or threatening to confiscate fishing gear, prevented the Makahs from taking fish from the Hoko river. (The right of "sport fishing," which is allowed, is impractical as shown more in detail hereafter.)

The applicable statute of the State of Washington empowers the defendant to promulgate rules and regulations concerning the taking of fish. Section 5717-1 Rem. Rev. Stat., '43 Supp.; Laws of Washington '43,

ch. 181, Sec. 1, p. 571. That act was merely amendatory of substantial equivalent laws theretofore in existence, Sec. 10868 Rem. Rev. Stat.; Laws of Washington 1929, p. 59; Sec. 10867-1 Rem. Rev. Stat.; Laws of Washington '29, p. 209. The applicable regulations are general orders Nos. 189 and 190 of the Director of Fisheries of the State of Washington promulgated on the 21st day of April, 1947. These regulations were likewise amendatory of somewhat equivalent regulations in prior existence. The regulations were introduced in evidence as plaintiff's (Ex. 7, R. 109, 209).

By regulation No. 4 of Order 189, it is made unlawful to fish at any place, at any time and in any manner and with any gear except as provided for in the Orders of the Director (Pls.' Ex. 7, R. 214, 215, 220).

Under said regulations the only fishing that is permitted in the Hoko River by the Makah Indians or any other person is so-called "sport fishing." The only gear permitted under sport fishing is one pole and one line and one hook per fisherman. There are strict limitations on the catch and none of the fish so caught may be bartered, sold, traded or exchanged (Pls.' Ex. 7, R. 220).

There was some conflict in the evidence as to whether or not fall salmon could be caught in the Hoko River by hook and line. The plaintiff's witnesses testified that they could not (R. 162, 175, 176, 207, 200). The State's witnesses testified that it was possible (R. 295, 312) but they admitted that such fish do not eat after entering the fresh water (R. 251). The

trial court indicated without specifically finding that they were unable to catch the fish by hook and line in the Hoko River (R. 31). At least even if possible, the Makah's do not find that it is a sufficiently worthwhile endeavor to be engaged in because they do not fish in the Hoko with hook and line (R. 176, 206, 207).

The defendant produced several expert witnesses who testified that in their opinion these regulations were necessary to the preservation of the fish run. These opinions, however, as shown by the testimony of the same witnesses, are based upon a particular plan or scheme conceived by the Department of Fisheries. The chief enforcement officer of the Department testified that the Department had only one enforcement officer in the Hoko area and that his area extended from Lake Quinault on the coast around Clallam and Jefferson Counties and around to Shelton on the lower end of Hood Canal or closer to the lower end of Hood Canal (R. 284, 289) and that it was utterly impossible for one man to do an efficient job of policing the area during the Fall season (R. 290). This is in spite of a biennial appropriation for the years 1947-49 of $2,220,000.00 (R. 246).

No actual count has ever been made by the Department of the silver run in the Hoko River by the means used in other areas (R. 249, 258). The chief biologist of the Department testified upon direct examination that they had a stream survey made by the then Director in 1932 and that report showed a "fairly large silver run" (R. 317) and that there has been "some" decrease since then (R. 318) but

that he would "hesitate to say that the River is capable of producing a larger silver run than is now in it" (R. 318). He then, upon cross-examination, conceded that it was possible to make a regulation by which some fishery could be permitted in the Hoko River without endangering the run and that the only obstacle to such regulation was the question of enforcement (R. 324, 325). The former Acting Director and now Supervisor of Hatcheries of the Department testified that in his estimation an escapement of between 4,000 and 5,000 fish per year would preserve the silver salmon run in the Hoko (R. 263).

Under the Department's regulations gill-net fishing has been made lawful in the Quinault, the Queets, Quillaute and the Hoh Rivers which are, like the Hoko, essentially creeks (R. 210). There is also gill-net fishing in the Skagit (R. 211) which, of course, is a larger river (R. 211).

The regulations which the Department has are applicable to all persons alike, whether treaty Indians or otherwise (R. 225, 226) and there is no contemplation of any change in that policy (R. 227).

The Department believes that when the salmon run is in the deep salt water the runs for the various streams are commingled and hence it prefers to limit fishing to those waters because it feels that the chances of taking too large a share of the run of fish from any one river is lessened (R. 310). This, of course, is the reason for the general rule provided by Section 28 of the regulations prohibiting all fishing within three miles of the mouth of any river entering into Puget Sound. This, of course, simplifies the

State's enforcement problem. Furthermore the State permits purse seining at the mouth of the Puget Sound. The catch of silver salmon by the purse seine fleet is enormous. The real danger is that this catch, combined with the troll catch and other allowable commercial fishery might deplete the run (R. 323).

The fish in the deep salt water are caught primarily by trollers but also by purse seiners and gill-netters (R. 169-170). There are in the vicinity of one-thousand trolling boats operating out of, and selling their fish in, the Neah Bay area (R. 169). Of these boats, five or six are owned or operated by Makah Indians (R. 173). There are also 25 or 30 Makah Indians who fish sporadically in the reservation area in the sound from canoes or small outboard motor powered row boats (R. 95). The Makahs also fish in the two streams on the reservation by gill-nets (R. 197-198). By all of these means the Makahs market between six and seven percent of all fish sold to the Fishermen's Cooperative Association and the Bay Fish Company which purchase fish in the Neah Bay or reservation area (R. 193).

Fishing is still an important and indispensable part of the economy of the Makah people. There are on the reservation 105 families with a total population of approximately 462 (R. 78). As shown by the minutes, Pls.' Ex. 8, p. 3, the estimate at the time of the treaty was a population of 585. Income from wages, earned chiefly in the logging industry, is the only item exceeding that of fishing (R. 74). The logging on the reservation, which provides this employment, is to be finished by 1955 (R. 79). All Mak-

ahs fish (R. 74), but only about 20% of the adults fish commercially (R. 75).

At the conclusion of the trial the court announced certain tentative conclusions, only a part of which has been reported (R. 336-337). Several months later, after written briefs had been submitted, the court announced his oral opinion (R. 19-32) departing from the indications announced at the conclusion of the trial, denying the plaintiffs' petition in toto. Before findings of fact and conclusions of law were entered the Honorable Judge who heard the case, the late Lloyd L. Black, died. Thereafter judgment of dismissal was entered on the oral opinion by the Honorable Peirson M. Hall. From that judgment this appeal is prosecuted.

SPECIFICATION OF ERRORS

The court erred:

(1) In holding that to permit the plaintiffs to take fish from the Hoko in their usual and accustomed manner would be to deprive the whites of the right to fish in common and hence the prohibition was impliedly agreed to in the treaty (R. 30).

(2) In holding that to permit a limited fishery by the plaintiffs would be to permit extermination of the salmon (R. 30).

(3) In holding that the present regulations are necessary for the conservation of salmon life in the Hoko River.

(4) In holding that because the regulations applied equally to all persons and there was no discrimination against the Indians and that they were reasonable, fair and requisite they did not conflict with rights guaranteed by the treaty (R. 31).

(5) In holding that the plaintiffs are asking the abolition of all regulation (R. 29 and 291).

(6) In denying the injunction and dismissing the proceeding (R. 32).

SUMMARY OF THE ARGUMENT

Since the Hoko River was, at the time the Makah Indians signed a treaty with the United States government, a "usual and accustomed fishing ground and station" of the said Makahs and the right of the Makah Indians to fish at their usual and accustomed fishing grounds and stations in common with all persons was further secured by said treaty, the State of

Washington, although it may regulate the right of Makahs to fish in said Hoko River, can not impose, by way of regulation, total or substantially total prohibition upon said right.

ARGUMENT

I.

The Treaty Guaranteed the Makahs Their Continued Right to Fish at Their Usual and Accustomed Stations.

The treaty with the Makahs contained the following provision with reference to their right to fish:

> "Article IV. The right of taking fish and of whaling or sealing at usual and accustomed grounds and stations is further secured to said Indians in common with all citizens of the United States, and of erecting temporary houses for the purpose of curing, together with privileges of hunting and gathering roots and berries on open and unclaimed lands: provided, however, that they shall not take shell-fish from any beds staked or cultivated by citizens."

The treaty is set out in full in Appendix B to this brief.

II.

The Hoko River Was a "Usual and Accustomed Fishing Ground and Station" of the Makah Indians at the Time the Makah Treaty Was Signed.

It was practically conceded by the defendant that the Hoko River was a fishing ground and station of the Makah Indians at the time of the signing of the treaty. The oldest witnesses available testified that throughout their lifetimes they had migrated to the banks of the Hoko in the fall to fish for salmon and

that there were then smoke houses and traps in the river (R. 111, 112, 122, 149, 155, 161), and one witness testified that according to legend the Makahs had fished in the Hoko River for generations and generations (R. 113) and that his grandfather was at the party that received the treaty rights and that in that treaty they understood they had the right to fish in the Hoko River as long as the tide came in and out again (R. 118).

III.

The Right "Further Secured" to the Makahs to Fish in the Hoko Was and Is an Important One.

(a) The importance at the time of the treaty:

There can be little question of the importance to the Makahs of their rights to fish in the Hoko at the time of the treaty. Their claim to the Hoko was recognized in the treay itself which describes their boundaries as being from the Hoko to the Coast (App. B). The minutes reflect that almost the sole concern of the Makahs in executing the treaty was that their right to maintain their livelihood from fish should be secured to them regardless of their conveyance of their interest in the lands (Pls.' Ex. 8, pp. 19, 20, 21). This was tersely stated by Klah-Pe-At-Hoo of Neah Bay as follows:

> "He was willing to sell his land; all he wanted was the right to fish." (Pls.' Ex. 8, p. 20)

The fact that the Hoko was a fall river heightened its importance. During the spring and summer months the Makahs cured the fish they caught and stored them in baskets to carry them through the win-

ter (R. 113, 114). In the fall of the year after other fishing was done they filled the remaining empty baskets from the Hoko (R. 112, 113). Thus the Hoko was in fact their insurance against a hungry winter.

(b) The importance today:

As can readily be ascertained from the map (Pls.' Ex. 1) the Makah reservation at Neah Bay is located in an isolated and unpopulated area. The nearest community of any size is Port Angeles some eighty miles away. The two chief items of present income of the Makahs are wages and fishing (R. 74). The chief source of wages now is the logging on the reservation which by contract is to be finished by 1955 (R. 79). Only five or six Makahs own regular commercial fishing boats (R. 173) which are competing with approximately one thousand commercial trolling vessels (R. 169) and untold numbers of purse seine boats (R. 323). Twenty-five or thirty Makahs fish in the reservation area in the Sound from canoes or small boats powered by outboard motors (R. 75). Some Makahs fish with gill nets in the two streams on the reservation (R. 197, 198). From all these sources Makahs market between six and seven per cent of all fish purchased by buyers in the Neah Bay area (R. 193). There are on the reservation now approximately 462 Makahs (R. 78) compared with an estimated population of 585 at the time of the treaty (Pls.' Ex. 8, p. 3). The right or ability of the Makahs to take another important food fish, that is the halibut, has also been serious curtailed by the United States Government (R. 70, 71, 72). It is thus apparent that

the fall salmon run of the Hoko River is as important, or possibly more important, to the Makah Indians now than it was at the time of the treaty.

IV.

A Liberal Interpretation Is to Be Given Rights Secured by Treaty and an Especially Liberal Construction Must Always Be Applied in Favor of the Rights Guaranteed to Indians in Treaties.

Tulee v. Washington, 315 U.S. 681, 86 L. ed. 1115;

Seufert Bros. Company v. U. S., 249 U.S. 194, 63 L. ed. 555;

Winters v. U. S., 207 U.S. 564, 52 L. ed. 340;

U. S. v. Kagama, 118 U.S. 375, 30 L. ed. 228;

Nielsen v. Johnson, 279 U.S. 47, 73 L. ed. 607;

Worcester v. Georgia, 31 U.S. 515, 8 L. ed. 483.

In *Nielsen v. Johnson*, 279 U.S. 47, 73 L. ed. 607, 610, speaking generally of rights granted by treaty, the court said:

> "Treaties are to be liberally construed so as to effect the apparent intention of the parties. *Jordan v. Tashiro*, 278 U.S. 123; *Geofroy v. Riggs*, 133 U.S. 258, 271; *In re Ross*, 140 U.S. 453, 475; *Tucker v. Alexandroff*, 183 U.S. 424, 437. When a treaty provision fairly admits of two constructions, one restricting, the other enlarging rights which may be claimed under it, the more liberal interpretation is to be preferred, *Asakura v. Seattle*, 265 U.S. 332; *Tucker v. Alexandroff*,

supra; Geofroy v. Riggs, supra, and as the treaty-making power is independent of and superior to the legislative power of the states, the meaning of treaty provisions so construed is not restricted by any necessity of avoiding possible conflict with state legislation, and when so ascertained must prevail over inconsistent state enactments."

In *Worcester v. Georgia,* 31 U.S. 515, 8 L. ed. 483, 508, Justice McLean concurring said:

"The language used in treaties with the Indians should never be construed to their prejudice. * * * How the words of the treaty were understood by this unletered people rather than their critical meaning should form the rule of construction."

In *Winters v. U.S.,* 207 U.S. 564, 52 L. ed. 340, 346, the court said:

"* * * Ambiguities occurring will be resolved from the standpoint of the Indians. And the rule should certainly be applied to determine between two inferences, one of which would support the purpose of the agreement and the other impair or defeat it. On account of their relation to the Government, it cannot be supposed that the Indians were alert to exclude by formal words every inference which might militate against or defeat the declared purpose of themselves and the government, even if it could be supposed that they had the intelligence to foresee the 'double sense' which might sometime be urged against them. * * *."

In *Tulee v. Washington,* 315 U.S. 681, 86 L. ed. 1115, 1120, the court referring to this very treaty provision said:

"From the report set out in the record before

us of the proceedings in the long council at which the treaty agreement was reached, we are impressed by the strong desire the Indians had to retain the right to hunt and fish in accordance with the immemorial customs of the tribe. It is our responsibility to see that the terms of the treaty are carried out, so far as possible, in accordance with the meaning they were understood to have by the tribal representatives at the council and in a spirit which generously recognizes the full obligation of this nation to protect the interests of a dependent people."

V.

Assuming that the Defendant Had the Right to Regulate Fishing by the Makah Indians in the Hoko River, Regulations Such as Those Enforced There by this Defendant, Which Amount to a Total or Substantially Total Prohibition of All Fishing by the Makahs in the Hoko River, Contravene the Rights Guaranteed by the Treaty.

(a) The defendant's regulations amount to a substantially total prohibition of all fishing by the Makahs in the Hoko River.

The regulations promulgated by the defendant were introduced into evidence as Plaintiff's Exhibit 7. By Section 4 all fishing is made unlawful by the regulations save that thereafter made lawful. By Section 28 of that order the only lawful fishing within three miles of the mouth of any stream entering into Puget Sound is the so-called sport fishing or hook and line fishing.

Such fishing has proved impractical, if not impossible.

There was a conflict in the testimony as to whether or not silver salmon could be caught by this means, the plaintiffs' witnesses testifying that they could not be so caught and they had tried. The defendant's witnesses testified that they could be so caught although they did not testify as to personal experience in the Hoko. The defendant's witnesses, however, admitted that the salmon did not eat after entering the fresh water, being impelled thereafter solely by the spawning instinct. If there is any possibility of catching them by this means it is so difficult and remote that it is valueless as shown by the undisputed evidence that the Makahs do not fish by this means in the Hoko. To limit the manner or method of catching fish to one that is so impracticable amounts to a total or substantially total prohibition.

(b) Such a prohibition contravenes the rights guaranteed by the treaty.

Tulee v. Washington, 315 U.S. 681, 86 L. ed. 1115;

United States v. Winans, 198 U.S. 371, 49 L. ed. 1089;

McCauley v. Makah Tribe, etc., 128 F.(2d) 867.

The foregoing three cases all involved treaty provisions practically identical to that with which we are here concerned. The latter case concerned this very tribe and this very provision and in fact, as stated by the trial judge, this action is in effect a successor to that one. In that case, which the trial court heard solely on the pleadings, a decree was en-

tered totally enjoining the defendant's predecessor from interfering in *any* manner with the right of the Makah Indians to fish in the Hoko River. This court reversed on the apparent ground that the decree was too broad. As stated by this court:

> "The case seems to have been tried by both parties on the theory that the Indians had either all fishing rights on the Hoko River or only those of non-Indian citizens." (128 F.(2d) 870)

As the court pointed out, neither position was tenable after the *Tulee* decision which had come down from the Supreme Court after the trial court had entered its decree and before this court rendered its decision. Such positions were clearly untenable because the Supreme Court in the *Tulee* case had said as follows:

> "It (meaning the State) argues that the treaty should not be construed as an impairment of this right (meaning its right to regulate fishing) and that since its license laws do not discriminate against the Indians, they do not conflict with the treaty. The appellant, on the other hand, claims that the treaty gives him an unrestricted right to fish in the 'usual and accustomed places' free from State regulation of any kind. We think the State's construction of the treaty is too narrow and the appellant's too broad; * * *."

Although this court invited further proceedings in the *McCauley* case, because of the intercession of the war and other factors not of record, further proceedings were not instituted until the commencement of this action.

This action was then instituted to determine the

answer to the following question: Assuming that the Makah Indians do not have by virtue of the treaty an "unrestricted right to fish," and further assuming that the State's right to regulate fishing is impaired by the treaty, is a regulation which substantially or totally prohibits fishing by the Makah Indians in the Hoko River violative of the treaty guarantee?

The net result of the present regulations is that the Makahs are placed in identically the same position as persons not having any treaty rights and, indeed, in the identically same position as if they had no treaty at all. This was conceded by the defendant director and he made the bland assertion that he proposed no change in that policy of treating all persons alike (R. 226, 227). In such a setting the words of the Supreme Court in *United States v. Winans*, 198 U.S. 371, 49 L. ed. 1089, 1092, in construing an identical provision of the treaty with the Yakimas sound a clear warning. The court said:

> "In other words, it was decided that the Indians acquired no rights but what any inhabitant of the territory or state would have. Indeed, acquired no rights but such as they would have without the treaty. This is certainly an impotent outcome to negotiations and a convention which seemed to promise more, and give the word of the nation for more."

As to depriving the Indians of the right to fish the court in that case further said at page 1092:

> "The right to resort to the fishing places in controversy was a part of the larger rights possessed by the Indians, upon the exercise of which there was not a shadow of impediment and which

> were not much less necessary to the existence of the Indians than the atmosphere they breathed. New conditions came into existence, to which these rights had to be accommodated. *Only a limitation of them, however, was necessary and intended, not a taking away. In other words, the treaty was not a granting of rights to them but a grant of right from them—a reservation of those not granted.* Citizens might share it, but the Indians were secured in its enjoyment by special provision of means for its exercise. They were given 'the right of taking fish at all usual and accustomed places' and the right 'of erecting temporary buildings for curing them'." (Emphasis supplied)

In that case the parties adverse to the Indians argued that since they had the right to fish in common they had a right through their mechanical ingenuity and superior knowledge to construct a device (a fish wheel) which took all the fish and so the Indians could get none. The court in rejecting that contention said, 49 L. ed. at page 1093:

> "But the result does not follow that the Indians may be absolutely excluded."

The court further said:

> "The argument based on the inferiority of the Indians is peculiar. If the Indians had not been inferior in capacity and power, what the treaty would have been, or that there would have been any treaty, would be hard to guess."

Those arguments and statements of the court are extremely appropriate to the contention of the State here that the Makah Indians may purchase expensive boats and equipment and compete in fishing in deep

salt water with over one thousand other boats owned and operated by white men and that their right so to do satisfies the requirements of the treaty. As the Supreme Court observed, such a result would certainly be an impotent outcome to the negotiations leading to the treaty.

It was also said in the *Tulee* case, 315 U.S. 681, 86 L. ed. 1115, at page 1120:

> "In determining the scope of the reserved rights of hunting and fishing, we must not give the treaty the narrowest construction it will bear. In *United States v. Winans*, 198 U.S. 371, 49 L. ed. 1089, 25 S. Ct. 662, this court held that, despite the phrase 'in common with citizens of the territory,' Article 3 conferred upon the Yakimas continuing rights, beyond those which other citizens may enjoy, to fish at their 'usual and accustomed place' in the ceded area; and *Seufert Brothers Company v. United States*, 249 U.S. 194, 63 L. ed. 555, 39 S. Ct. 203, a similar conclusion was reached even with respect to places outside the ceded area. From the report set out in the record before us of the proceedings in the long council at which the treaty agreement was reached we are impressed by the strong desire the Indians had to retain the right to hunt and fish in accordance with the immemorial customs of their tribes. It is our responsibility to see that the terms of the treaty are carried out, so far as possible, in accordance with the meaning they were understood to have by the tribal representatives at the council and in the spirit which generously recognizes the full obligation of this nation to protect the interests of a dependent people."

A regulation is not consistent with the treaty merely because it applies to all persons indiscriminately. In other words, as held directly in the *Winans* case and the *Tulee* case, the words "in common" did not give the State power to impose any regulations it saw fit merely because it made them applicable alike to Indians and non-Indians. As the court in those cases pointed out, the rights reserved to the Indians were important and substantial and since they were reserved rights as compared with the granted rights to the whites their rights were and are substantially greater than the non-Indians. So it appears that it is no answer for the State to say that they have the right of prohibition as long as they equally prohibit non-Indians.

Since the whites were granted the right to fish "in common," and in view of the interpretation thereof by the Supreme Court in the *Tulee* and *Winans* cases, it would seem that it would be proper to construe the treaty to mean that the Indians agreed to some form of regulation which would in effect protect the right of the whites to fish in common and that such regulation might be imposed by any appropriate governmental agency. From this it must be concluded and conceded by the plaintiffs that they may not insist upon an unrestricted right to fish in such a manner that they totally destroy the run of fish, whether the means of accompishing that end would be by their ancient fishing gear or by more modern equipment. Likewise it would not seem to be a reasonable construction of the treaty to say that the Makahs agreed that they would never

fish except by their ancient methods, particularly if those methods were curtailed. This was quite clear because, as shown by plaintiffs' Exhibit 8, Governor Stevens promised to furnish them with better fishing equipment than they then had (Pls.' Ex. 8, p. 21).

A more reasonable interpretation of the treaty would be that the Makahs were secured not in any particular manner of fishing but in their right to take from the Hoko River, the title to which they were ceding to the United States, fish in a substantial quantity as an important element of their tribal economy. In other words, this was the *quid pro quo* of their agreement. This *quid pro quo* was what they insisted on rather than any particular method of securing it.

It is apparent from the treaty negotiations that what the Indians wanted, and all they wanted, was the right to take fish in the quantity which was essential to their economy. It is clear that they understood that was what they were quaranteed by the treaty. It has so often been said as to be no longer open to argument, that treaties should be construed as the Indians understood them.

> *Seufert Bros. Company v. U. S.* 249 U. S. 194, 63 L. ed. 555;
>
> *Worcester v. Georgia*, 31 U. S. 515, 8 L. ed. 483;
>
> *Tulee v. Washington*, 315 U. S. 681, 86 L. ed. 1115.

The appellants, therefore, take the position that

since the regulation of the Defendant amounts to a virtual prohibition of their fishing in the Hoko it violates their treaty rights. The appellants concede that, under the language of the *Tulee* and *Winans* cases *supra*, defendant may make regulations as to the manner, methods and times the Makahs may fish at the Hoko so long as the fish to be taken by the allowed methods, times and means and within the resources of the river results to them in their receiving the *quid pro quo* of their agreement. This was the purpose in presenting, insofar as it could be accomplished from present living witnesses, the evidence as to the use of the Makahs by the Hoko caught fish in the olden days. It appeared that the Hoko was important because as the Makahs fished all summer and stored their smoked and cured fish supplies for the winter when the fall salmon run appeared in the Hoko they took stock and determined what more they needed to tide them through and this deficiency was supplied by the salmon from the Hoko. Likewise, now, with the Makahs greatly dependent upon a fish economy and with the prospect that in the very near future as the logging on the reservation is completed, this will become increasingly so, the Hoko and its fall salmon run still play an important part in their economy.

The trial court apparently misunderstood the appellants' position for he inferred that we were asking that the Supreme Court holdings be ignored (R. 29). Unfortunately the lack of oral argument prevented us from correcting this misconception.

It is the appellants' position that it is the sum

total of the prohibitions contained in the regulation which violate the treaty. Individually and singly the various prohibitions might or might not do so. It was impossible for the appellants to segregate the good from the bad. The appellants attacked the regulation in toto and did ask, and now ask, the court to declare the regulation invalid as against these treaty rights. We take it that the question that presented itself to the court's mind was, "What then is the result if it is not a total freedom from restriction?" The result is that it would then be incumbent upon the Director of the Department to draft a substitute regulation which would grant to the plaintiffs the right guaranteed to them by the treaty and still limit the catch in such a manner that the run of fish would not be destroyed. Undoubtedly the discussion by the court of the rights of the parties would furnish a standard to the Director for such a regulation. Such a procedure leaves a great deal of flexibility and discretion to the Director in the selection of the times and methods, etc., of fishing, which is only right and proper because he is in a position to be advised by those expert in the field. This it seemed to plaintiffs was the only possible procedure.

VI.

The Almost Total Prohibition Imposed by the Present Regulation Is Not "Necessary."

What is or is not "necessary" will, of course, vary with the circumstances and context within which the word is used. The context here is that there is in existence a treaty right which is a solemn obligation of the United States arrived at in the course of dealing with a people to whom the United States owe a duty of protection.

> *Winters v. U. S.*, 207 U. S. 564, 52 L. ed. 340;
>
> *Tulee v. Washington*, 315 U. S. 681, 86 L. ed. 1115.

The rights so guaranteed have been interpreted by the Supreme Court as being subject to "necessary" limitations. *Tulee v. Washington, supra.* The "necessary" limitations should be strictly construed in order to give the guaranteed rights the liberal construction to which they are entitled.

> "When a treaty provision fairly admits of two constructions, one restricting, the other enlarging rights which may be claimed under it, the more liberal interpretation is to be preferred * * *." *Nielsen v. Johnson*, 279 U. S. 47, 73 L. ed. 607

Any ambiguity in the limitation to which it may be said the Indians agreed should be construed in their favor.

> *Worcester v. Georgia*, 31 U. S. 515, 8 L. ed. 43;
>
> *Winters v. U. S., supra.*

The defendant's proof that the present regulation was necessary was largely, if not entirely, to the effect that he lacked the necessary manpower to enforce a less strict regulation. In view of the importance and solemnity of the obligation imposed by the treaty such a showing is insufficient to establish "necessity."

The trial court, however, apparently adopted the view of the defendant, for he said:

> "The defendant has available only an insufficient patrol service if the plaintiffs are free from conservation regulations." (R. 30)

(The court must have meant that the defendant has only an insufficient patrol service if the plaintiffs are subject to a *limited* conservation regulation, for, obviously, if there were no conservation regulation no patrol at all would be needed).

A somewhat similar argument was made in the *Tulee* case where it was contended that the license requirement was necessary because it was a generally convenient and fair method of accomplishing the purposes for which it was intended. The court there held that the fact that it was convenient and its general impact fair did not prevent it from contravening the treaty rights of the Indians.

The plea of the lack of funds for adequate patrol in itself seems incredible in view of the facts that the Hoko is only twenty to fifty feet wide (R. 285), eighteen miles long (R. 263); that the fall fishing season lasts only about two months and the defendants' annual budget is in excess of One Million Dollars (R. 246).

Aside from these considerations, the facts belie the stated opinions of the defendant's partisan experts that the regulation was necessary. It was uncontradicted that the Makahs had fished the Hoko since at least 1900 with gear which they secured from the white men (R. 155, 156, 132) and sold these fish to buyers who were on the spot with tenders (R. 156), yet in 1932 when the only survey that the department has undertaken was made, the report was that the River had a "fairly large" run of silver salmon (R. 317). Shortly thereafter, the department stopped the fishing of the Makahs.

Since the right to take fish from the Hoko was undeniably guaranteed the Makahs by their treaty and since they are now denied the right to take fish from that River, the burden of proving the necessity of such a prohibition lies with the defendant, and this was recognized by the defendant in his pleading, yet there was a total failure of any proof that the silver run of the Hoko River is diminished, reduced, or depleted to any degree whatsoever. In the first place, the defendant's witnesses admitted that no count has ever been made in the Hoko as it has in other streams (R. 249, 250). Secondly, there was no evidence of any depletion at any time even when the former injunction obtained by the Makahs was in effect. The defendant's Chief Inspector testified on direct examination as follows:

> "Q How did the runs at that time (1943) compare with the runs that were in the River in abundance at the time you first observed there?"
>
> A Well, the River, like other streams has its

ups and downs. Some years there is a fair amount of silver salmon in there, and other years there apparently are not as many.

Q Has there been an increase or decrease in the abundance of fish in the stream during the time you have had the stream under your observation?

A I am afraid I cannot answer that question * * *." (R. 287)

Likewise, the chief biologist for the Department of Fisheries testified on direct examination that "I would hesitate to say that the River (Hoko) is capable of producing a larger silver run than is now in it" (R. 318).

He conceded further that regulations could be made which would permit the taking of fish without endangering the run (R. 324, 325).

Furthermore, it was stated by the Department's chief biologist that the real danger is not from fishing on the Hoko but from the fishing in the mouth of Puget Sound.* In attempting to explain why the Department allowed a limited commercial fishery, to-wit, gill netting, on the streams flowing into the Pacific Ocean but not on those flowing into Puget Sound he said as follows:

"The runs of fish as they enter Puget Sound through the Straits are fished by a large purse seine fleet. When this purse seine fleet operates,

*It is apparent from the context that the witnesses followed the common local practice of referring to all waters out to the ocean as "Puget Sound" although technically, of course it does not extend so far westward.

particularly in the odd years, when they go out for pink salmon, it operates on the Cape (Flattery). They have in the past got more silver salmon than the troll fleet, and the total catch is enormous.

"Now, we have the possibility of these two fleets congregating on the silver salmon that enter Puget Sound, and for that reason we feel that a limited commercial fishery is justifiable on the ocean streams, whereas it is too dangerous to operate on the Puget Sound streams."

From this it is clear that the Department creates its own "necessity" by permitting such a vast fishery at the mouth of Puget Sound. The right of the Indians to take fish at their usual and accustomed ground should be protected by the courts rather than the right granted by the defendant to the purse seine fleet to take the fish to the exclusion of the Indians. The following language from the case of *United States v. Kagama*, 118 U. S. 375, 30 L. ed. 228, at 231 is appropriate:

"Because of the local ill feeling, the people of the states where they (the Indians) are found are often their deadliest enemies. From their very weakness and helplessness, so largely due to the course of dealing of the Federal government with them and the treaties in which it has been promised, there arises the duty of protection, and with it the power. This has always been recognized by the Executive and the Congress, and by this court whenever the question has arisen."

The situation is similar to that in the *Winans* case (198 U. S. 371, 49 L. ed. 1089) wherein it was argued

that it was not inconsistent with the treaty to license the white men to take fish by means of a fish wheel which prevented any fish from going up to the Indians' grounds and that the white men had this right by virtue of their right to fish "in common." The Supreme Court disposed of that contention by saying that the Indians could not by such means be excluded. That is no different from the defendants position here that because he allows large purse seine fishery at the mouth of the Sound he can not allow any further fish to be taken by the Indians at their usual and accustomed place.

CONCLUSION

It is respectfully submitted that the judgment and decree of the trial court dismissing the complaint was erroneous and should be reversed and that the cause should be remanded to the trial court for the entry of an injunction substantially in accordance with the prayer of plaintiffs' complaint.

Respectfully submitted,

J. DUANE VANCE,
BASSETT & GEISNESS,
Attorneys for Appellants.

APPENDIX A

Abstract of Plaintiffs' Exhibit 8

TREATY OF NEAH BAY

"MONDAY, JANUARY 29TH. The Schooner reached Neah Bay on the evening of the 28th, and today the tents, goods and men were landed and the camp established. Governor Stevens, the agent and interpreter immediately put themselves in communication with the Indians of the Bay through the medium of Capt. E. S. Fowler, a Kallam Sub-chief called Capt. Jack, who spoke the Makah language, and two Makahs Iwell Or Jefferson Davis and Peter who spoke Chinook. Expresses were immediately sent off to bring in the other Makah Villages and also if possible the tribes adjoining them on the Coast.

"TUESDAY, JAN. 30. Gov. Stevens and the Secretary (George Gibbs) crossed the Peninsula of Cape Flattery to the Coast for the purpose of making a general examination of the country and selecting a spot suitable for the separate reserve of this tribe and such others as might be included with them. The Indians of the other Makah Villages arrived today but stated that the other tribes could not be called in until several days. It was accordingly determined to send for them to meet at Grays Harbor. In the evening Governor Stevens called a meeting of the Makah Chiefs on board the Schooner to hear the details of the proposed treaty more particularly. Being interrogated as to their relations with the tribes below them, they said that with the Kive-deh-tut or Kwilleh-yeites they were on terms of amity, as also with the Kwaaksat or Hooch, but that with the next band or tribe the Kivites or Kehts ahuat, they were not, that tribe having killed one of their people once years ago. They did not however desire to cherish any animosity, but did not know the

feelings of that tribe towards them. They were directed to make a full return of each of their own villages the next day.

"Governor Stevens then informally mentioned the principal features of the proposed treaty as follows, 'The great Father has sent him here to watch over the Indians. He had talked with the other tribes of the Sound, and they had promised to be good friends with their neighbors and he had now come to talk with the Makahs. When he had done here he was going to the Indians down the Coast and would make them friends to the Makah. He had treated with the Sound Tribes for their land, setting aside reserves for them and had stipulated to give them a school, farmer, etc., and a physician, when he had finished.

"KAL-CHOTE OF NEAH BAY spoke, 'Before the big Chiefs (Kleh-silt, the White Chief, Yellacoon or Flattery Jack and Heh-iks) died he was not the head chief himself, he was only a small chief, but though there were many Indians there, he was not the least of them. He knew the country all around and therefore he had a right to speak. *He thought he ought to have the right to fish and take whales and get food where he liked. He was afraid that if he could not take halibut where he wanted, he would become poor.*'

"KEH-CHOOK of the Stone House followed—'What Kalchote had said was his wish. *His country extended up to Hoke-ho. He did not want to leave the salt water.*'

"GOV. STEVENS informed them that so far from wishing to stop their fisheries, he intended to send them oil, kettles and fishing apparatus.

"KLAH-PE-AT-HOO of Neah Bay. 'Since his brother died, he had been sick at heart (his brother was the late 3d chief) *He was willing to sell his land; all he wanted was the right of fishing.*

"TSE-HAU-WTL—'He wanted the sea! What was his country if whales were killed and floated ashore, he wanted for his people the exclusive right of taking them and if their slaves ran away, they wanted to get them back.'

"GOVERNOR STEVENS replied that he wanted them to fish but that the whites should fish also. Whoever killed the whale was to have them if they came ashore. He added as a reason for buying their land that many whites were coming into the Country and that he did not want the Indians to be crowded out.

KALCHOTE *resumed*—'He wanted always to live on his old ground and to die on it. He only wanted a small piece for a house and would live as a friend to the whites and they should fish together.'

"KAH-PE-AT-HN—'He and Kalchote lived together. They did not want to leave their old home.'

"TEE-KAW-WTL—said the same thing. He too only wanted his house.

"KEE-BACH-SAT *of tso-yeas*—'My heart is not bad but I do not wish to leave all my land. I am willing you should have half, but I want the other half myself. You know my country. I want part for my village. It is very good. I want the place where the stream comes in.'

"HAATSE his brother was of the same mind.

"IT-AN-DAHA of Waatch—'My father my father! I now give you my heart. When any ships come and the Whites injure me I will apply to my father and will tell him of my trouble and look to him for help, and if any Indians wish to kill me, I shall still call on my father. *I shall submit all my difficulties to him; my wish is like the rest, I do not wish to leave the salt water. I want to fish in common with the whites.* I don't want to sell all the land. I want a part

in common with the whites to plant potatoes on. I want the place where my house is. We do not want to say much, we are all of one mind. I have no particular country myself, mine and that of the Tse-Kaw-Wtl are the same.'

"KAL-CHOTE again—'I do not want you to leave me destitute. I want my house on the Island (Tatoosh Island, commonly called the Stone House).

"GOVERNOR STEVENS asked *'whether if the right of drying fish wherever they pleased was left them, they could not agree to live at one place for a winter residence and* potato ground explaining the idea of subdivision of lands and he desired them to think the matter over during the night. They were also directed to consult among themselves upon the choice of a head chief. As they declined doing this on the ground that they were all of equal rank, he selected Tse-kow-wootl, the Ozette Chief as the head. A choice in which they all acquiesced with satisfaction.

"Temporary papers in lieu of commissions were then issued to Kal-chote, and Klah-pe-at-hu of Neah, Kah-tchook of the Stone House) (Tatooch I) It-an-da-ha and Waatch Heatse and Kebach sat of Tasoyess as sub chiefs.

"COL. SIMMONS then explained to them that 'these papers were given them as evidence that they were chiefs, that as such they must take care of the people, and that by and bye the great papers would be given them. On his former visit they had declined to receive papers, but now they were evidently much valued.' The general council was then adjourned to the next day.

"JANUARY 31, WEDNESDAY—The heads of the Treaty had been adjusted and on the morning the Indians were again assembled. Two additional sub-chiefs received papers, viz: Tsha-a-kowtl of Osett and

Kats-kussum of the Stone House. The number of the whole tribe was found to be 600. Governor Stevens then addressed them: 'My children I have seen many other of my children before you. They have been glad to see me and to hear the words of the Great Father. I saw the Great Father a short time since and he sent me here to see you and give you his mind. The whites are crowding in upon you and so the Great Father wishes to give you your homes. He wants to buy your land and give you a fair price but leaving you enough to live on and raise your potatoes. He knows what whalers, you are, how you go far to sea, to take whales. *He will send you barrels in which to put your oil, kettles to fry it out, lines and implements to fish with.* The Great Father wants your children to go to school and learn trade and this will be done if we agree today, I am now about to read you a paper, If you like it, we will sign it. If it is good I shall send it to the Great Father and if he likes it he will send it back with his name. If he wants it altered he will let you know, when it is agreed to, it is a bargain.'

"The treaty was then read to them, interpreted clause by clause and explained.

Governor Stevens then asked if they were satisfied. If they were to say so. If not to answer freely and state their objections.

"TSE-KNW-WTL brought up a white flag and presented it saying—'Look at this flag, see if there are any spots on it. There are none and there are none in our hearts.'

KSI-CHOTE presented another flag—'What you have said was good and what you have written is good.'

"The Indians gave three cheers or shouts as each concluded. The governor then signed the treaty and followed by the Indian chiefs and principal men.

"The Treaty is as follows:

NOTE: Here follows the Treaty with the Makahs on January 31, 1855, 12 Stat. p. 939; Vol. 2, Cappulars Law & Treaties, p. 510.

"The presents were afterwards distributed and in the evening the party reembarked. Owing to the wind the vessel did not reach Port Townsend till the 3rd of February. The next day (February 4th) Gov. Stevens left with some of the party in the steamer Mayor Tompkins for Victoria in order to confer with Gov. Douglas on the subject of the Northern Indians and on the 5th returned to Port Townsend and reached Olympia on that night of the 6th."

[*All italics supplied*]

APPENDIX B

Treaty with the Makah, 1855

Jan. 31, 1855
12 Stat., p. 939
Proclamation, Apr. 18, 1859
Ratified Mar. 8, 1859

"Article of Agreement and convention, made and concluded at Neah Bay, in the Territory of Washington, this thirty-first day of January, in the year eighteen hundred and fifty-five, by Isaac I. Stevens, governor and superintendent of Indian Affairs for the said Territory, on the part of the United States, and the undersigned chiefs, headmen, and delegates of the several villages of the Makah Tribe of Indians, viz: Neah Waatch, Tsoo-Yess, and Osett, occupying the country around Cape Classett or Flattery, on behalf of the said tribe and duly authorized by the same.

"Article I. The said tribe hereby cedes, relinquishes and conveys to the United States all their right, title, and interest in and to the lands and country occupied by it, bounded and described as follows, viz: Commencing at the mouth of the Oke-ho River, on the Straits of Fuca; thence running westwardly with said straits to Cape Classett or Flattery; thence southwardly along the coast to Osett, or the Lower Cape Flattery; thence eastwardly along the line of lands occupied by the Kwe-deh-tut or Kwill-eh-yute tribe of Indians, to the summit of the coast-range of mountains, and thence northwardly along the line of lands lately *deded* to the United States by the S'Klallam tribe to the place of beginning, including all the islands lying off the same on the straits and coast.

"Article II. There is, however, reserved for the present use and occupation of the said tribe the following tract of land, viz: Commencing on the beach at the mouth of a small brook running into Neah Bay next to the site of the old Spanish fort; thence along the shore round Cape Classett or Flattery, to the mouth of another small stream running into the bay on the south side of said cape, a little above the Waatch village; thence following said brook to its source; thence in a straight line to the source of the first-mentioned brook, and thence following the same down to the place of beginning, which said tract shall be set apart, and so far as necessary surveyed and marked out for their exclusive use; nor shall any white man be permitted to reside upon the same without permission of the said tribe and of the superintendent or agent; but if necessary for the public convenience, roads may be run through said reservation, the Indians being compensated for any damage thereby done by them. It is, however, understood that should the President of the United States hereafter see fit to place upon the said reservation any other friendly tribe or band to occupy the same in common with those above mentioned, he shall be at liberty to do so.

"Article III. The said tribe agrees to remove to and settle upon the said reservation, if required so to do, within one year after the ratification of this treaty, or sooner, if the means are furnished them. In the meantime it shall be lawful for them to reside upon any land not in the actual claim and occupation of citizens of the United States, and upon any laid claimed or occupied, if with the permission of the owner.

"Article IV. The right of taking fish and of whaling or sealing at usual and accustomed

grounds and stations is further secured to said Indians in common with all citizens of the United States, and of erecting temporary houses for the purpose of curing, together with the privileges of hunting and gathering roots and berries on open and unclaimed lands; provided, however, that they shall not take shell-fish from any beds staked or cultivated by citizens.

"Article V. In consideration of the above cession the United States agree to pay to the said tribe the sum of thirty thousand dollars, in the following manner, that is to say: During the first year after the ratification hereof, three thousand dollars for the next two years, twenty-five hundred dollars each year; for the next three years, two thousand dollars each year; for the next four years, one thousand five hundred dollars each year; and for the next ten years; one thousand dollars each year; all of which said sums of money shall be applied to the use and benefits of the said Indians, under the direction of the President of the United States, who may from time to time determine at his discretion upon what beneficial objects to expend the same. And the superintendent of Indian affairs, or other proper officer, shall each year inform the President of the wishes of said Indians in respect thereto.

"Article VI. To enable the said Indians to remove to and settle upon their aforesaid reservation, and to clear, fence, and break up a sufficient quantity of land for cultivation, the United States further agree to pay the sum of three thousand dollars, to be laid out and expended under the direction of the President, and in such manner as he shall approve. And any substantial improvements heretofore made by any individual Indian, and which he may be compelled to abandon

in consequence of this treaty, shall be valued under the direction of the President and payment made therefore accordingly.

"Article VII. The President may hereafter, when in his opinion the interests of the Territory shall require, and the welfare of said Indians be promoted thereby, remove them from said reservation to such suitable places within said Territory as he may deem fit, on remunerating them for their improvements and expenses of their removal, or may consolidate them with other friendly tribes or bands; and he may further, at his discretion, cause the whole, or any portion of the lands hereby reserved, or such other land as may be selected in lieu thereof, to be surveyed into lots, and assign the same to such individuals or families as are willing to avail themselves of the privilege, and will locate thereon as a permanent home, on the same terms and subject to the same regulations as are provided in the sixth article of the treaty with the Omahas, so far as the same may be practicable.

"Article VIII. The annuities of the aforesaid tribe shall not be taken to pay debts of individuals.

"Article IX. The said Indians acknowledge their dependence on the Government of the United States, and promise to be friendly with all citizens thereof, and they pledge themselves to commit no depredations on the property of such citizens thereof, and should any one or more of them violate this pledge, and the fact be satisfactorily proven before the agent, the property taken shall be returned, or in default thereof, or if injured or destroyed, compensation may be made by the Government out of their annuities. Nor will they make war on any other tribe except in self-

defense, but will submit all matters of difference between them and other Indians to the Government of the United States or its agent for decision and abide thereby. And if any of the said Indians commit any depredations on any other Indians within the Territory, the same rule shall prevail as that prescribed in this article in case of depredations against citizens. And the said tribe agrees not to shelter or conceal offenders against the United States, but to deliver up the same for trial by the authorities.

"Article X. The above tribe is desirous to exclude, from its reservation the use of ardent spirits, and to prevent its people from drinking the same, and therefore it is provided that any Indian belonging thereto who shall be guilty of bringing liquor into said reservation, or who drinks liquor, may have his or her proportion of the annuities withheld from him or her for such time as the President may determine.

"Article XI. The United States further agree to establish at the general agency for the district of Puget Sound, within one year from the ratification heerof, and to support for the period of twenty years, an agricultural and industrial school, to be free to children of the said tribe in common with those of other tribes of said district and to provide a smithy and carpenter's shop, and furnish them with the necessary tools and employ a blacksmith, carpenter, and farmer for the like term to instruct the Indians in their respective occupations. Provided, however, that it should be deemed expedient a separate school may be established for the benefit of said tribe and such others as may be associated with it, and the like persons employed for the same purposes at some other suitable place. And the United States

further agree to employ a physician to reside at the said central agency, or at such other school should one be established, who shall furnish medicine and advice to the sick, and shall vaccinate them; the expenses of the said school, shops, persons employed, and medical attendance to be defrayed by the United States and not deducted from the annuities.

"Article XII. The said tribe agrees to free all slaves now held by its people, and not to purchase or acquire others hereafter.

"Article XIII. The said tribe finally agrees not to trade at Vancouver Island or elsewhere out of the dominions of the United States, nor shall foreign Indians be permitted to reside in its reservation without consent of the superintendent or agent.

"Article XIV. This treaty shall be obligatory on the contracting parties as soon as the same shall be ratified by the President of the United States."